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Citation for published version:

Lamont-Black, S 2015, 'The Impact of the DCFR on Third Party Rights under Shipping Documents: A UK Perspective on the Potential for Harmonisation', *European Journal of Commercial Contract Law*, vol. 7, no. 1-2, pp. 21-31. <https://doi.org/10.7590/187714615X14328875962500>

Digital Object Identifier (DOI):

[10.7590/187714615X14328875962500](https://doi.org/10.7590/187714615X14328875962500)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

European Journal of Commercial Contract Law

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The impact of the DCFR on third party rights under shipping documents - a UK perspective on the potential for harmonisation*

1. Introduction

Could the Draft Common Frame of Reference (DCFR)¹ change shipping law? Although only soft law at present, what would be the impact of implementing its rules on third party rights under transport documents in the laws of EU Member States? Would this result in a true change in UK shipping law regarding third party rights? After setting out the UK framework, this article will discuss the DCFR rules and compare and contrast them with the current provisions in the UK. As will be shown, the situation in the UK is far from straightforward. Analysing the impact of the DCFR rules against this framework, it will be argued that implementation of the DCFR third party rules throughout, including the whole of shipping and transport law, would have potential for welcome simplification.

It is generally accepted that a bill of lading in the appropriate form is able to function as a document of title and that the holder of the bill of lading can claim delivery of the goods enshrined therein from the carrier.² How the third party obtains this right to delivery has been explained in different ways by different legal systems. Many theories seem to point to a contractual solution, even if there are also some approaches which are non-contractual, mainly the statutory solution in the UK or views that the holder's position should be categorised as *sui generis*.³

Continental Europe seems to generally favour the contractual approach and see the contract of carriage as a contract for the benefit of a third party or as a three-party contract.⁴ This seems to be confirmed by the stipulations in favour of the third party consignee in transport conventions which were heavily influenced by continental thinking,⁵ such as the CMR,⁶ COTIF-CIM⁷ and the CMNI,⁸

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¹ C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, European Law Publishers, 2010).

² See *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell, 2011) (hereafter *Scrutton*), chs 2 & 10 esp. paras 2-008 and 10-001 & 10-005; Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press, 2011) (hereafter *Girvin*), ch 8; G Treitel and F Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011) (hereafter *Carver*), chs 5 & 6; F Stevens, "Third Party Rights under Bills of Lading", [2012] EJCCL 54, 56 and see also F. Smeele, "The bill of lading contracts under European national laws (civil law approaches to explaining the legal position of the consignee under bills of lading)" in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, 2009) 251, 253.

³ See F Stevens, "Third Party Rights under Bills of Lading", [2012] EJCCL 54, listing the UK Carriage of Goods by Sea Act 1924 (hereafter CoGSA 1924) and some Belgian case law as examples of the non-contractual category and concluding in agreement with DeWitt in favour of a *sui generis* classification.

⁴ See Law Commission, *Privity of Contract: Contract for the Benefit of Third Parties* (Law Com No LC242, 1996), para 3.8 and F Smeele, "The bill of lading contracts" at p 251 et seq. with reference to The Netherlands and Germany, by the doctrine of a contract in favour of third parties ("Derdenbeding" or "*Vertrag zugunsten Dritter*" respectively) and in France as a three-party contract (*contrat à trois personnes*); and more generally M Sturley, T Fujita, J van der Ziel, *The Rotterdam Rules, The UN Convention on Contracts for the International Carriage of Goods wholly or Partly by Sea*, (Sweet & Maxwell, London 2010) (hereafter *Sturley et al*) at para 10.002 and see O Lando and H Beale (eds), *Principles of European Contract Law, Part I: Performance, Non-performance and Remedies, Combined and Revised* (Kluwer Law International, 2000), Art 6:110 and Notes.

⁵ F Smeele, "The bill of lading contracts" at 258.

⁶ The United Nations Convention on International Carriage of Goods by Road 1956 (CMR); see CMR, art 13.

⁷ CIM stands for Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, being Appendix B to the Convention concerning International Carriage by Rail 1980 in the version of the Protocol of Modification of June 3, 1999 (COTIF); see CIM, art 17.

⁸ Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) (2001), see CMNI, arts 10, 13 & 14.

but also the Warsaw and Montreal Conventions⁹. The Principles of European Contract Law (PECL)¹⁰ and the Draft Common Frame of Reference (DCFR)¹¹ also seem to understand in the transport conventions a specific codification of the general third party rule.¹²

2. The fragmented position in the UK

The framework in the UK

In the UK different rules on and approaches to the position of third parties¹³ pertain depending on the type of contract and the legal system involved, that is, that of either England & Wales, Northern Ireland or Scotland. The core rule in the law of England & Wales was strict privity of contract, meaning that the contract was a relationship exclusive to the parties who made it and who, in turn, were the only ones able to enforce it. This principle was eroded bit-by-bit by case-law and statutory amendment, such as the former Bill of Lading Act 1855, replaced by the current Carriage of Goods by Sea Act 1924 (CoGSA 1924¹⁴), but also by the much broader Contracts (Rights of Third Parties) Act 1999 (TPA), the latter being only applicable in England & Wales and Northern Ireland. In contrast, Scotland, like most other European jurisdictions, recognised rights of third parties in certain situations already for centuries. The principle, known as the “*jus quaesitum tertio*”, was founded in case-law, on the basis that the privity rule yields to the even more fundamental principle of freedom of contract, thus taking account of the intention of the parties, who may contract to confer a benefit on a third party.

However, whilst the principle of *jus quaesitum tertio* is recognised, its details and boundaries are far from clear. The Scottish Law Commission has thus emphasised the need for its modernisation¹⁵ and close modelling on the principles developed by the DCFR,¹⁶ by the UNIDROIT Principles of International Commercial Contracts (PICC)¹⁷ and by the Proposal for a Regulation on a Common European Sales Law (CESL),¹⁸ bearing in mind the English TPA which the Commission saw as generally on the same lines.¹⁹

A need for the separate treatment of carriage of goods?

Similarly to the English TPA, the Scottish reform discussions consider whether to only implement reform of the general rules and to leave unaffected the specific matters governed by statutory or

⁹ Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw) 1929 (WC) (and its versions as amended respectively by the Hague Protocol 1955, and/or the Additional Protocols agreed at Montreal in 1975, Nos 1, 2 and 4, and supplemented by the Guadalajara Convention 1961) and Convention for the Unification of Certain Rules for International Carriage by Air (Montreal) 1999 (MC); see WC, art 13 and MC, art 13.

¹⁰ O Lando and H Beale (eds), *Principles of European Contract Law, Parts I and II (Combined and Revised)*, prepared by the Commission of European Contract Law (Kluwer Law International, 2000).

¹¹ C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, European Law Publishers, 2010).

¹² See DCFR Commentary to II.-9:301 at E and PECL Commentary to art 6:110 H.

¹³ I.e. contractual and statutory or *sui generis*.

¹⁴ To be distinguished from the CoGSA 1971, which has a different ambit altogether, and implements the Hague-Visby Rules into the laws of the UK.

¹⁵ Discussion Paper 157 - Review of Contract Law: Third Party Rights in Contract, News Release “Two’s a Party; Three’s a Crowd?” available at: <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/> (last accessed on 06.01.2015).

¹⁶ C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, European Law Publishers, 2010), Model Rules II.-9:301 – II.-9:303.

¹⁷ UNIDROIT Principles of International Commercial Contracts (PICC) (3rd edn, 2010), arts 5.2.1 – 5.2.6, available at: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (last accessed 06.01.2015).

¹⁸ Proposal for a Regulation on a Common European Sales Law (CESL), COM(2011) 635 final, art. 78, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> (last accessed 06.01.2015).

¹⁹ Scot Law Com DP 157, paras 1.16 – 1.19.

common law rules which tended to be recognised for particular spheres of activity, such as the carriage of goods. These considerations were partly due to subject matter considerations and partly due to constitutional constraints.²⁰ The relevant specific statutory solutions for our purposes are the CoGSA 1992 and the implementations into UK law of the various road, rail and air transport conventions. Both the CoGSA 1992 and the Acts and statutory instruments implementing the CMR, COTIF-CIM, and the Warsaw, Guadalajara²¹ and Montreal Conventions are applicable throughout the whole of the United Kingdom,²² thus also binding Scotland.

Already during the reform discussion preceding the TPA, the (English) Law Commission decided to leave the existing provisions on carriage of goods undisturbed, so as not to risk causing unacceptable commercial uncertainty by changing these rules and not to interfere with the different underlying policy considerations in this area, since the regulation of carriage of goods was underpinned by a different legal model. Under the CoGSA 1992 a type of statutory assignment was effected maintaining a relationship between benefit and burden, by transferring rights but also effecting a corresponding burden on the third party. Under the 1992 Act, the transfer of the bill of lading led to the loss of the right in the hands of the initial party and only a limited type of third party may avail himself of rights under the contract. Commercial uncertainty was to be avoided by keeping to a system that worked, rather than reforming it in the interest of uniformity with general principles.²³ Similar considerations also applied to the exclusion of contracts for the carriage of goods by road, rail or air under international conventions, where rights and burdens were connected, only limited third parties were entitled to benefit from the ‘transfer’ and where at least in some of the conventions enforcement rights were only to be exercised by either the consignor or the consignee.²⁴

But is it really necessary to regulate third party rights in the carriage of goods separately? The situation in the UK is rather complex and depending on where and how the transportation takes place, by which means of transport and under which documents, whether carriage is domestic or international, whether it is English law or Scots law that is applicable, whether damage is localised²⁵ or not, different rules apply, such as the UK CoGSA 1992, the English TPA 1999, the Scottish principles of *jus quaesitum tertio*, or the rules of international transport conventions²⁶ as implemented into UK law.

The discussion in the UK on the position of electronic bills of lading²⁷ and whether multimodal bills of lading can fall within the CoGSA 1992,²⁸ whereas road and rail consignment notes and airway bills

²⁰ See Scot Law Com DP 157, ch. 8 and see Scotland Act 1998, sections 28 & 29 and Sched 5 regarding the limited legislative competence of the Scottish Parliament.

²¹ The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara) 1961.

²² See the Carriage of Goods by Road Act 1965, the Railways (Convention on International Carriage by Rail) Regulations 2005 (SI 2005/2092), the Carriage by Air Act 1961, the Carriage by Air (Supplementary Provisions) Act 1962, the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899.

²³ Law Com No LC242, 1996, paras 12.7 – 12.11.

²⁴ Law Com No LC242, 1996, paras 12.12 – 12.15.

²⁵ See *Quantum Corporation Inc v Plane Trucking* [2002] EWCA Civ 350, [2002] 1 WLR 2678, [2002] 2 Lloyd's Rep 25, where the CMR was held applicable to the road leg of a multimodal transport enshrined in a master air waybill.

²⁶ See also the relevant third party provisions enshrined in the transport conventions: CMR, art 28.2; CIM, art 41.2; MC, art 43; and the Guadalajara Convention for air transport under the Warsaw Convention. For sea carriage see the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25th August 1924 as amended by the Protocol signed at Brussels on 23rd February 1968 (Hague-Visby Rules (HVR)), art IVbis; the United Nations Convention on the Carriage of Goods by Sea, Hamburg, 1978 (Hamburg Rules (HambR)), arts 7.2 and 10.2; the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008, opened for signature at Rotterdam; not (yet) in force (Rotterdam Rules (RR)), art 4; and for carriage by inland waterways the CMNI, art 17.3.

²⁷ See CoGSA 1992, s1(5)-(6) and see P Bugden, S Lamont-Black, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013) (hereafter Bugden) para 5-017; Beale and Griffiths, “Electronic commerce: formal requirements in commercial transactions” [2002] LMCLQ 467, 477, Clarke, “Transport documents: their transferability as document of title; electronic documents” [2002] LMCLQ 356, 359 and more generally on electronic bills of

are covered by the TPA (unless they are excluded from the TPA due to their inclusion in international transport conventions) seems to reveal an artificial distinction between the different modes of transport and their documents, unless the difference can be adequately explained by the bill of lading's function of a document of title or by sea transport being so substantially different from other modes as to require different treatment in the dealings with third parties.

This paper seeks to identify whether the DCFR rules on third parties rights would be appropriate to regulate the whole area of carriage irrespective of the mode and nature of the transport and the transport document used and, if so, which changes this would bring as regards to the current position in English law.

While the DCFR was not intended, at least without further modification or supplementation, for matters of bills of exchange, cheques and promissory notes and other negotiable instruments,²⁹ - and one may return to the discussion whether a bill of lading falls under the definition of other negotiable instruments³⁰ - the commentary explains that this is only meant as a warning, alerting to the fact that the rules were not developed with the listed matters in mind.³¹ Thus, one does not need to limit the DCFR rules to an application on consignment notes alone, but is free to consider whether they are also apt to be applied to bills of lading.

If, after careful evaluation, it was still felt that third party rules on the carriage of goods (by sea) ought to be specialised and set apart from the general rule and that the third party bill of lading rules could not be classified satisfactorily as provisions for a conferral of rights on a third party but instead were *sui generis* or other, then it may indeed warrant a separate stipulation, which would yet have to be modelled under the DCFR.³²

3. Comparative analysis of the different regimes

If one applied the DCFR rules, what would the changes be from a UK perspective? Could the same rules be applied to bills of lading and other transport documents alike? Could such rules therefore

lading, including their application under the Rotterdam Rules see Gaskell, "Bills of Lading in an Electronic Age" [2010] LMCLQ 233, 269 ff.

²⁸ For a discussion of third party rights under multimodal transport documents see S Lamont-Black, "Third Party Rights and Multimodal Transport Documents" in F Lorenzon, *Third Parties' Rights and Bills of Lading*, (Informa Law, 2015, forthcoming); R D Thomas, "International Sale Contracts and Multimodal Transport Documents: Two Issues of Significance", in Soyer and Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, 2014), 145, 158; A Tettenborn, "Bills of Lading, Multimodal Transport Documents, and Other Things" in Soyer and Tettenborn (eds), op cit, 126, 138 and M Ozdel "Multimodal Transport Documents in International Sale of Goods" [2012] ICCLR 238, 246-247; cf. Bridge, *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell, 2010), (hereafter *Benjamin*), para 21-083 and *Treitel and Reynolds, Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011), paras 8-084 – 8-092.

²⁹ I.-1:101(2).

³⁰ Which under English law it would not (see Guest, *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell, 2010) at para 26-088 and Fawcett, Harris, Bridge, *International Sale of Goods in the Conflict of Laws* (OUP, 2005) at paras 14.03 et seq.), but see also Recital (9) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I): "Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character."

³¹ Commentary to I.-1:101(2).

³² While the DCFR contains rules on the transfer of a (full) contractual position under the DCFR (see III.-5:301 - III.-5:302 on transfer of contractual position by agreement), it is unlikely that these would be deemed suitable. The carrier would not normally wish to replace his contracting party completely with an unknown third party. It thus seems unlikely that his consent to such a transfer of position could be implied merely by the act of issuing a transport document. Equally it is not usually intended that the entire contractual position is transferred but rather that limited rights (and potentially also the duties) arising from the bill of lading can be vested in the third party – which is pointing again towards a third party rights solution.

harmonise the approach to third parties involved in shipping transactions, whether within the UK or throughout the EU Member States? To evaluate the impact of such a change the differences in requirements and effects of the CoGSA 1992, the TPA and the third party rights provisions of the DCFR will be contrasted while asking whether the DCFR is capable of providing an appropriate solution.

Scope

Alongside the specialised CoGSA 1992, the TPA creates a further and broad statutory exemption from the strict English privity rules. Whereas the CoGSA 1992 is only available to lawful holders of bills of lading³³ and the persons designated to receive the goods under a sea waybill or a ship's delivery order, and gives only the rights and duties specified in the CoGSA, the TPA gives any third party a direct right to claim under a contract made between others if the contracting parties intended him to have such right. It is up to the contracting parties to decide what right is to be bestowed on the third party. The TPA gives the third party either a positive right to enforce a contractual provision in his favour, such as in claiming delivery of goods consigned to him under a local road consignment note,³⁴ or a negative right in that he can avail himself of an exclusion or limitation clause provided in the contract; for example where a non-contracting performing carrier or other independent contractor of the carrier wishes to rely on a Himalaya type protection clause in the contract of carriage.³⁵ To similar effect, the DCFR provides broadly that parties can confer a right or other benefit on a third party,³⁶ which can also be the benefit of an exclusion or limitation of the third party's liability.³⁷ In contrast, the CoGSA 1992 focuses only on the cargo receiver as third party and does not extend to non-contracting carriers or other independent contractors; so that other constructs and principles such as agency were required to ensure Himalaya clauses were effective to protect the non-contracting carrier or other independent contractors of the carrier. The TPA now supplements the CoGSA 1992 to close this gap, yet the DCFR is capable of effectively dealing with both benefits, positive and negative, at the same time. The TPA and the DCFR confer benefits only, whereas the 1992 Act vests rights of suit and liabilities in the third party holder, consignee or deliverer.

Requirements

The conferral of rights under the DCFR is done by means of the contract and it is the contract that determines the nature and content of the third party's right or benefit.³⁸ Whether or not a right was conferred will depend on the intention of the parties as express or implied in the contract.³⁹ The third party does not need to be identified at the time of the conclusion of the contract nor does he need to be in existence at that time.⁴⁰ The requirements are defined somewhat narrower under the TPA. For the third party under the TPA to have a right of his own to enforce a term of the contract, one of two alternatives must be fulfilled. The contract must either a) expressly provide for such a right of the third party or b) the contract term must purport to confer a benefit on the third party, unless on proper construction of the contract it appears that the contracting parties had not intended the term to be enforceable by the third party.⁴¹ Similarly to the DCFR, the third party needs not be in existence at the time of the conclusion of the contract, yet under the TPA the third party must be identified in some way, whether by name, as a member of a class, or as answering a particular description.⁴²

Potentially any third party can qualify under the TPA or the DCFR, whereas only the lawful holder of a bill of lading, the consignee under a sea waybill or the deliverer under a ship's delivery order can avail himself of rights of suit under the CoGSA 1992 which the Act vests in the third party. The

³³ See CoGSA 1992, s 2(1) and s 5(2) – (3).

³⁴ TPA 1999, s 1(1); note that international road carriage would usually be covered by the CMR, so that the TPA would not apply (s 6(5)(b)).

³⁵ TPA 1999, s 1 (6).

³⁶ DCFR, II.-9:301(1).

³⁷ DCFR, II.-9:301(3).

³⁸ DCFR, II.-9:301(2).

³⁹ See DCFR Commentary to II.-9:301 at E.

⁴⁰ DCFR, II.-9:301(1).

⁴¹ TPA 1999, s 1(1),(2). The burden of proof that the intention was not to confer a benefit is thus on the contracting party.

⁴² TPA 1999, s 1(3).

contracting parties have no choice whether they wish or intend to effect a transfer of rights and duties under the 1992 Act; the transfer is automatic, whereas under the TPA or the DCFR the parties can choose by means of their contract terms, express and implied, whether a conferral of a benefit - and of a benefit only - is to take place. The DCFR thus allows overall most flexibility to cater for the needs and fulfil the intentions of the parties.

Remedies provided for third parties

Under CoGSA 1992, the qualifying third party has “transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to the contract”,⁴³ although this is limited where a bill of lading no longer gives a right to possession of the goods as against the carrier.⁴⁴ To enforce a term of the contract in his favour under the TPA, the third party can avail himself of any remedy that would have been available to him, had he been a party to the contract, with rules relating to damages, injunctions, specific performance and other relief applying accordingly.⁴⁵ The DCFR here provides a slightly different approach, giving the third party only the same rights and remedies as if the contracting party was bound to render the performance under a binding unilateral undertaking in favour of the third party.⁴⁶ This is to take account of the fact that some of the remedies under a contract depend on mutuality; therefore not all remedies under the contract are capable of being used by the third party.⁴⁷ The DCFR thus clarifies that the position of the third party is as provided for him by the contracting parties and not necessarily the same as between the contracting parties under the contract.

How would this play out in a bill of lading context? The contract of carriage is almost invariably made before the bill of lading is issued and may contain differing or additional provision to those of the bill, particularly where bills of lading are issued under charterparties.⁴⁸ Under the flexibility of the DCFR rules, where a bill of lading is issued one may take account of trade usage and, for example, imply that the parties to the contract of carriage giving rise to the bill were intending to confer on the holder of the bill of lading the rights to delivery and corresponding rights to damages for loss of or damage to the goods. Depending on whether the bill of lading is a straight consigned, an order or a bearer bill, the rights would be intended to be with the named consignee, the consignee to whom the goods are ordered to be delivered or to the bearer of the bill, as the case may be, as the appropriate third party.

On the basis of the receipt and evidence function of the bill of lading, the parties surely would be taken to have intended these rights to be based on the statements on, and terms of, the bill of lading itself. One may even go further and imply that due to the importance of the receipt function, particularly where the bill of lading acts as a document of title or symbol of the goods,⁴⁹ the bill of lading in the hands of the third party is meant to be conclusive evidence and thus the contracting party, here the carrier, had undertaken towards the third party holder that the statements and terms of the bill of lading are accurately represented,⁵⁰ even where the contract itself may have included amendments or other stipulations. Any express contractual provisions to the contrary to invalidate the statements or terms of the bill of lading would be falling foul of the principles of good faith and fair

⁴³ CoGSA 1992, s 2(1).

⁴⁴ See CoGSA 1992, s 2(2).

⁴⁵ TPA 1999, s 1(5).

⁴⁶ DCFR, II.-9:302(a)

⁴⁷ DCFR Commentary to II.-9:302(a).

⁴⁸ See Bugden, para 7-020.

⁴⁹ Given to the bill of lading by the custom of merchants; see *Lickbarrow v Mason* (1794) 5 TR 683; R Aikens, R Lord and M Bools, *Bills of Lading* (Informa, 2006) paras 1.28 – 1.45; G Treitel and F Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011), para 6-002 and Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press, 2011), paras 8.02 ff. See also HGB, § 519, stipulating this effect for the new German Maritime Law.

⁵⁰ See also Girvin paras 6.03, 6.06, 6.19 & 6.23 on relevant English case-law using estoppel by representation to similar effect and see insofar also the new German Maritime Law, HGB, §§ 517 and 522(2) on the evidentiary effect of the bill of lading.

dealing under the DCFR and may also possibly constitute unfair terms.⁵¹ That the statements in the bill of lading as to goods shipped and their condition should be irrefutable evidence between the third party and the contracting party is also backed by most sea carriage conventions, that is, the Hague-Visby Rules, Hamburg and Rotterdam Rules.⁵²

The CoGSA 1992 also relies heavily on the principles developed by the common law as it does not define whether and which bill of lading statements can be relied upon by a third party. Other than treating a representation in a bill of lading that goods had been shipped or received for shipment, as the case may be, as conclusive evidence, the 1992 Act does not deal with other representations, such as to weight, quantity or condition.⁵³ It is therefore submitted that the DCFR is just as capable of tackling the situation presented by the bill of lading's document of title, receipt and evidence functions. Both the DCFR and the CoGSA 1992 allow a focus on the document and its clauses, rather than referring back to the original contract of carriage, as in the TPA, which would not be appropriate here.

Conditions and limitations on conferred benefit

As in the CoGSA 1992,⁵⁴ the rights available to the third party under the TPA⁵⁵ as well as those under the DCFR⁵⁶ are not limitless, but are curtailed to the content and terms of the contract and thus subject to any conditions or other limitations under the contract. Thus, for example, where the right to claim damages under the contract is limited to a certain monetary ceiling the third party will only be able claim damages up to such amount, as the contractual limitation clause will also be valid as against him.⁵⁷ The Commentary to the DCFR specifically highlights that the rules of the DCFR are consistent with the stipulations of transport conventions regarding the right of disposal of the consignor and the conditions under which the consignee may claim delivery of the goods.⁵⁸ The right to delivery of the goods may thus be conditional upon payment of freight or expenses due under the transport document.

Under the DCFR one could argue that, as the basis is a transfer of rights rather than that of liabilities, the third party ought to be able to determine the conditions and connected burdens to his right at the time of claiming delivery, so that he can decide whether to make use of the right or not.⁵⁹ As long as overall there is a transfer of rights, rather than a net transfer of burdens or liabilities, the DCFR seems

⁵¹ See DCFR, Principles, Nos 17 (contractual security: main ingredients), 23 (contractual security: good faith and fair dealing), 25 (contractual security: inconsistent behaviour), 42 (contract: not allowing people to rely on their own unlawful, dishonest or unreasonable conduct), 48 (non-contractual obligations: not allowing people to gain an advantage from their own unlawful, dishonest or unreasonable conduct) and Model Rules, Book I General Provisions I.-1:102(3): Interpretation and Development; I.-1:103(2): good faith and fair dealing; Book II Contracts and other juridical acts, II. – 3:301: Negotiations contrary to good faith and fair dealing, II. -9:402: Duty of transparency of terms not individually negotiated, II. -9:405: Meaning of “unfair” in contracts between businesses; Book III Obligations and Corresponding Rights, III. – 1:103: Good faith and fair dealing.

⁵² See HVR, art III r 4, HambR, art 16.3(b) and RR, art 41.2. Although for bills of lading under the Hague Rules and for consignment notes under other forms of transport, such statements would only be prima facie evidence, see HR, art III r4; CMR, art 9; CIM, art 12 and MC, art 11 and WC, art 11 and see Bugden, ch 6 and Smeele, 251, 254 f.

⁵³ See CoGSA 1992, s 4(1), enacted to amend the common law rule in *Grant v Norway* (1851) 10 CB 665 that a master had no apparent authority to sign bills of lading for goods not actually shipped. However, s 4 only deals with bills of lading, so the old common law rule remains in force for sea waybills and ship's delivery orders. For other representations recourse to the principles of estoppel are needed. See also Bugden, paras 6-009 ff and 6-014 and Girvin paras 6.03, 6.06, 6.19 & 6.23.

⁵⁴ CoGSA 1992, s 2(1) – “as if he had been a party to that contract”.

⁵⁵ TPA 1999, s 1(4) and s 8.

⁵⁶ DCFR, II.-9:301(2).

⁵⁷ Although subject to the framework of mandatory rules, which may impose higher limits or a longer limitation period. See also G Treitel, “The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea” in Rose (ed), *LEX MERCATORIA: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP Professional Publishing, 2000), 345, 346.

⁵⁸ DCFR Commentary to II.-9:301 at E.

⁵⁹ For such an approach see for example the new German Maritime Law, German Commercial Code (Handelsgesetzbuch (HGB)), § 494 (2) and (3) and §§ 530 (3) 2 and 535 (1) 2.

to allow the attachment of conditions to the conferral of rights. Liabilities can thus, it is submitted, only be incurred by the third party up to the value of the right and no further. This would be a departure of the solution as enshrined in the CoGSA 1992, which allows the imposition of burdens on the third party holder of the bill of lading once he has made use of his rights.⁶⁰ The impact may, however, it is submitted, be slighter than it seems at first, as the courts have been reluctant to impose severe burdens.⁶¹

Jurisdiction and arbitration clauses as a condition on the conferred benefit?

Another question of importance in the context of carriage is whether any jurisdiction and arbitration clauses included in the contract or in a transport document can be validly imposed on the third party, as well as relied upon by him. The question as to whether a jurisdiction clause could bind a third party was addressed by the European Court of Justice (ECJ)⁶² in Case 71/83 *Tilly Russ*⁶³ and Case C-387/98 *Coreck Maritime*⁶⁴ which set out that firstly, one had to look at the fulfilment of the formal requirements of the prorogation provision of the Brussels I jurisdiction regime⁶⁵ as between the initial parties to the agreement. Secondly, where those requirements were met, whether the jurisdiction clause could bind the third party depended on (a) whether under the applicable national law the third party succeeded to the shipper's rights and obligations when he acquired the bill of lading, in which case the clause was binding, or (b) if this was not the case, whether the third party had agreed to the jurisdiction clause, for example by claiming against the carrier in the forum stipulated in the bill. While the ECJ/CJEU decision is relevant for matters on court jurisdiction only, and not on arbitration clauses,⁶⁶ the problem in the latter context is also that to resort to arbitration usually requires a valid arbitration agreement by the parties who are to be subjected to arbitration. An agreement by the contracting party for the third party may not be sufficient in the absence of a later ratification by the third party.

Under the CoGSA 1992,⁶⁷ the bill of lading holder "has transferred and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract" and conversely becomes⁶⁸ "subject to the same liabilities under that contract as if he had been a party" to it. Therefore in accordance with the jurisprudence of the ECJ/CJEU the lawful holder succeeds in the rights and obligations of the contracting party and is thus bound by the jurisdiction clause, as well as by an arbitration clause.

What however with the conditional benefit approach of the TPA and also that of the DCFR? It seems that this cannot be taken as a full transfer of a contractual position and there is thus a need to construe an agreement or ratification of the third party to the dispute resolution clause, for it to be validly enforced. A section 8 was inserted into the TPA by Government amendment at the Report Stage in the House of Commons in order to ensure that an arbitration clause in the contract would also be binding on the third party, despite the Law Commission's concerns.⁶⁹ In *Nisshin*,⁷⁰ the High Court agreed that

⁶⁰ See CoGSA 1992, s 3(1).

⁶¹ See further below at "Transfer of obligations".

⁶² As it was then; now it is called the Court of Justice of the European Union (CJEU).

⁶³ Case 71/83 *Partenreederei ms Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR 2417.

⁶⁴ Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others*, [2000] ECR I-9337.

⁶⁵ See insofar, as of 10 January 2015, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L351, 20.12.2012, p 1, also referred to as the Brussels I Recast), art 25.

⁶⁶ Arbitration being excluded from the scope of the Brussels I regime, see Brussels I Recast, art 1(2) (d).

⁶⁷ CoGSA 1992, s 2(1).

⁶⁸ After acts showing his intention to take up these rights, such as demanding delivery or making a claim; see CoGSA 1992, s3(1).

⁶⁹ Explanatory Notes, paras 9, 33 - 35 to s 1(4) and s 8 and see *Law Com No LC242, 1996*, paras 14.14-14.19 on the difficulties in providing for jurisdiction and arbitration clauses in the third parties legislation, recommending to exclude the matter from the reform. See also C Ambrose, "When can a third party enforce an arbitration clause?" [2001] JBL 415, 419 f and A Burrows, "The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts" [2000] LMCLQ 540, 511 f.) and see *Fortress Value Recovery Fund I LLC v Blue Sky Special Opportunities Fund LP* [2013] EWCA Civ 367; [2013] 1 W.L.R. 3466; [2013] 1

where a positive benefit that was claimed by the third party under the TPA, it was subject to the arbitration clause under the main contract; although in interpreting the provision, the court also drew an analogy to a statutory assignment.

What would the solution be under the DCFR? The DCFR provision on remedies⁷¹ may suggest that a third party claiming against the contracting party can only do so as provided by the contract, yet as if the right to performance was provided by a binding unilateral undertaking. This undertaking could be subject to an arbitration or a forum clause. This suggests that it would have to be clear from the contract whether a dispute resolution clause was intended to also cover the third party position or was only intended to govern the contracting parties.⁷² Where the rights were enshrined in a bill of lading one may deem it to be clear that the dispute resolution provision was also intended for the third party, but where the dispute resolution mechanism was only provided as part of the contract as a whole, it may be more difficult to discern an intention to also bind the third party to this method. For example, for the validity of charterparty arbitration clauses on third parties, one would need to seek guidance from the rules of incorporation as to whether the clause was also meant for the third party relationship. Although, it might be useful to remember that a similar analysis is also necessary under the CoGSA1992, as the third party is taken to have transferred to him the rights as enshrined in the bill of lading, sea waybill or ship's delivery order, even if this was not the relevant contract of carriage as between the initial parties, for example, because they were operating under a charterparty.

For the purpose of an arbitration agreement or to satisfy the ECJ/CJEU's requirements on jurisdiction agreements, the unilateral undertaking according to the DCFR could thus be seen as including an offer to arbitrate or to litigate in a particular forum, which may be accepted by the third party using the rights conferred on him.⁷³ While the DCFR generally does not require acceptance of the right for it to be validly conferred, acceptance would seem to be of importance regarding the reach of a dispute resolution clause.

However, where the contracting party wanted to sue the third party, it seems that, in the absence of an act that would be taken as an acceptance of the dispute resolution clause, the ordinary rules of allocating jurisdiction would have to be used. This may cause difficulties where the conferred benefit was that of a limitation clause so that no positive enforcement of rights would take place. That the reference to a benefit arising from a limitation clause would be sufficient as to constitute an acceptance of the offer for agreement to litigate in the particular forum or to arbitrate is unlikely, even more so, if such reliance only took place at litigation stage.⁷⁴ If the use of the exclusion or limitation clause was only possible in the forum as agreed by the contracting parties, one would in effect require

Lloyd's Rep. 606, [1, 29, 36, 42 - 45] on arbitration agreements and their potential application on third parties via the TPA 1999.

⁷⁰ *Nisshin Shipping Co Ltd Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 Lloyd's Rep 38 for direct claims of a chartering broker under charterparties; the broker availing himself of the third party right in this contract also had to use the remedy of suing in arbitration as provided for in the contract; as approved of in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367; [2013] 1 W.L.R. 3466; [2013] 1 Lloyd's Rep. 606, [24, 29].

⁷¹ DCFR, II.-9:302(a).

⁷² C Ambrose, p 422 ff.

⁷³ There is good argument that the requirements of art 25.1(c) of the Brussels I Recast Regulation of a jurisdiction agreement in the form of trade usage are fulfilled. For references to the acceptance of jurisdiction agreements under third party beneficiary concepts see N Carrette, "Third Party Beneficiary in Commercial Law: A Comparative Analysis of Belgian, Dutch, English and French law", [2012] EJCCL 21, 29 f. See also TPA 1999, Explanatory Notes, paras 8, 33 - 35 to s 1(4) and s 8, but see *Law Com No LC242, 1996*, paras 14.14-14.19 on the difficulties in providing for jurisdiction and arbitration clauses in the third parties legislation, recommending to exclude the matter from the reform; yet rules to cover arbitration agreements were inserted by Government amendment at the Report Stage in the House of Commons (see C Ambrose, "When can a third party enforce an arbitration clause?" [2001] JBL 415, 419 f and A Burrows, "The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts" [2000] LMCLQ 540, 511 f.) and see also *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367; [2013] 1 W.L.R. 3466; [2013] 1 Lloyd's Rep. 606, [1, 29, 36] on arbitration agreements and their potential application on third parties via the TPA.

⁷⁴ See C Ambrose, "When can a third party enforce an arbitration clause?" [2001] JBL 415, 419 f.

the third party to take the burden of submitting to a forum which he had not chosen and to proceedings which he had not initiated. This would then indeed impose a burden on the third party, not acceptable under the DCFR.

This is not comparable to the situation where a substantive benefit, such as a claim for an indemnity, is subject to a procedural condition. In contrast, if a forum clause in the main contract had the effect of giving the designated forum exclusive jurisdiction over the question of availability of the defence to the third party, the third party would have to submit to jurisdiction of this forum. Yet, if disputes were not to be fragmented, this forum would also decide the claim against the third party as a whole, even where it was decided that the defence was not available. Thus, the benefit of the (negative) limitation or exclusion could in the end create a serious burden instead. In the words of Tomlinson LJ, in a case where this question arose under the TPA, this would be “a striking outcome”. He rejected such a result, even though section 8 of the TPA⁷⁵ had been specifically introduced in the Act so as to facilitate the reach of arbitration agreements.⁷⁶

It is thus submitted that a third party’s avail of a contractual limitation or exclusion clause bestowed on him in a contract between others, cannot be interpreted as having the effect of accepting the arbitration or jurisdiction clause of the contract. Such a benefit could not outweigh the burden that would otherwise be imposed and would fall foul of the conditional benefit approach of the DCFR. Where a positive right enshrined in a transport document is concerned however, the acceptance or use of the transport document by the third party may lead a court to conclude that the documents’ forum clause was also agreed or ratified. One may argue that a buyer who would not wish to accept a bill of lading with a particular dispute resolution clause could have instructed his seller accordingly and thus had a choice whether or not to “agree” to the clause.

While a more straightforward solution and better clarity as to the validity of arbitration and jurisdiction clauses on third parties is achieved by means of the CoGSA 1992, the DCFR seems capable of solving a good deal of the issues via its conditional benefit approach. The reach and boundaries will however have to be determined by the courts, although one could try to help a uniform approach by inserting a paragraph into the DCFR specifically accepting forum clauses as means of enforcing positive benefits conferred upon the third party. It may be of interest to remember here that the case of negative enforcement of a limitation clause is not covered by the CoGSA 1992 either, due to the Act’s narrow scope, thus remaining to be considered under a conditional benefit approach. However, even if it was not possible to guarantee the validity of jurisdiction and arbitration clauses, should this be a major sticking point?

Consent of the third party seems to be the status quo under the Brussels I jurisdiction regime and the jurisprudence of the ECJ/CJEU. The ECJ/CJEU’s argumentation referring to the applicable law for determining the consequences of a jurisdiction clause under the Brussels I jurisdiction regime and whether under this law the third party could be seen as stepping into the shoes of the contracting party, has been held to be unique to the bill of lading context, mostly due to the fact that bills of lading in most Member States were seen as a negotiable instrument.⁷⁷ In general however, the CJEU held that the concept of a jurisdiction clause must be interpreted as an independent concept, giving full effect to the principle of freedom of choice. While “the conditions and forms under which a third party to the contract may be regarded as having given his consent to a jurisdiction clause may vary in

⁷⁵ See *Fortress Value Recovery Fund I LLC v Blue Sky Special Opportunities Fund LP* [2013] EWCA Civ 367; [2013] 1 W.L.R. 3466; [2013] 1 Lloyd’s Rep. 606, [29, 36]. The case concerned an application to stay court proceedings in favour of arbitration by asset managers as third party beneficiaries of an exclusion clause in a partnership deed. Suit was brought against them in tort for dishonest mismanagement. The third parties wanted to rely on the arbitration clause as binding upon proceedings against them. Both the High Court and the Court of Appeal refused the application to stay proceedings, although with partly different reasoning. See TPA 1999, Explanatory Notes para 34 last sentence.

⁷⁶ See TPA 1999, Explanatory Notes paras 33 – 35.

⁷⁷ Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and others* at [24-41, esp. 34 ff.]. In particular, it was not transferrable to the context of a buyer and sub-buyer’s relationship to a manufacturer of goods which whom he had made no direct contract, but only obtained the goods from his seller, the initial buyer.

accordance with the nature of the initial contract”,⁷⁸ consent of the third party is generally needed for the third party to be able to rely on or be bound by the provisions of a jurisdiction agreement.⁷⁹ Consent would thus be required where the transport document was not a bill of lading but a consignment note.

Furthermore, is it essential that jurisdiction and arbitration clauses are upheld in the relationship between carrier and third party holder of the bill of lading? While such clauses allow the contracting parties to calculate their exposure, it is submitted that the reliance on the allocation of exclusive fora may no longer be the status quo. The more recent sea carriage conventions, the Hamburg and Rotterdam Rules, similarly to the road, rail and air transport conventions contain rules on jurisdiction and arbitration which do not allow for exclusive jurisdiction based on an agreement, but contain a number of choices in favour of the claimant as to where he can bring suit, the place agreed being only one of them.⁸⁰ Giving the claimant the choice of forum, while possibly leading to a race to the courts to forum shop, may also encourage performance to a higher standard, particularly where certain performance duties have received different treatment in the courts of different countries, such as the question of whether certain contractual provisions fall foul of mandatory rules or what constitutes wilful misconduct under the CMR or other transport conventions. To keep to several different third party regimes merely to ensure validity of jurisdiction and arbitration clauses on third parties in certain circumstances in sea transport⁸¹ may thus no longer seem such an important end in itself – although from a UK perspective it is certainly a key advantage to be able to provide certainty for the industry and to ensure the validity of clauses in favour of UK courts or arbitration proceedings seated in the UK.

Overall it seems that the DCFR via acceptance of the forum clause can solve many of the forum problems. Where there is no consent or ratification the forum clause however cannot be used against the third party. So for example where a carrier wanted to sue the third party bill of lading holder, even where the holder had not taken any steps of using his rights, which in turn may be interpreted as acceptance of the rights enshrined in the bill together with the forum clause, such a claim would have to be filed according to the normal rules of jurisdiction. However such a claim could not be filed in the forum as per contractual agreement under the CoGSA 1992 either, as in order to become liable under the bill the third party must have taken steps to assert his rights.⁸² Equally the ordinary jurisdiction rules would have to be used where a third party was sued who may be able to claim a benefit of a limitation or exclusion clause only – again leading to no change of the status quo.

Time of transfer/conferral; modification and revocation of benefit

The CoGSA 1992 only vests rights on the bill of lading holder once and so long as the bill of lading is transferred to him and has not been passed further down the line.⁸³ Before the bill of lading has been transferred no rights vest in a third party and the contracting parties are free to alter or amend it. The TPA contains rules on variation and rescission of the contract by the parties to protect a third party who is relying on a clause in his favour.⁸⁴ Once the third party has communicated his assent to the promisor, the promisor is aware that the third party has relied on the term in his favour or, where this can reasonably be expected to be foreseen by the promisor and the third party has in fact relied on the term, the contract can no longer be rescinded or the term varied, unless there is an express provision to the contrary⁸⁵ or the third party consents.⁸⁶ Under the DCFR the rules on modification and

⁷⁸ Ibid at [30].

⁷⁹ Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and others* at [40].

⁸⁰ See HambR, arts 21, 22; RR, chs 14 and 15; CMR arts 31, 33; CIM art 46; cf. MC, art 33 (without scope for a jurisdiction agreement) and 34.

⁸¹ I.e. where the CoGSA 1992 requirements are fulfilled and no Hamburg or Rotterdam Rules apply, although the latter are not (yet) in force.

⁸² CoGSA 1992, s 3(1).

⁸³ See CoGSA 1992, s 2(1), (5) and *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205.

⁸⁴ TPA 1999, s 2.

⁸⁵ TPA 1999, s2 (1) – (3).

⁸⁶ TPA 1999, s2 (1), (4) – (5).

revocation are both, broader and narrower. Unless the benefit was communicated to the third party it can be freely removed or modified, as it has not yet been conferred. After conferral, it depends on whether the right or benefit is irrevocable and whether this is the case is determined by the contract. If the right is irrevocable it is irrelevant whether the third party has relied on it or not.⁸⁷ Reliance is however determinative even where the right is revocable or subject to modification, where the parties have let the third party believe that the right could not be modified or revoked.⁸⁸

Relevant in a shipping context is that the original contract may differ from the one enshrined in the transport document and amendments to the contract and documents are generally possible. While this may give rise to difficulties under the rules of the TPA,⁸⁹ it seems that the DCFR provides sufficient flexibility to allow modification of the rights. However, where rights are enshrined in transport documents, reliance would seem to be the norm, in particular where the document was transferred or handed over to the third party according to the usual rules for such a document. Further, the benefit could be lost by the third party where he transferred the bill of lading to a fourth party or where he exercised his right of disposal available under a consignment note. The contract would seem to imply that the right moves to the fourth party and the new consignee and thus no longer vests in the original third party.

Performance rights of the contracting party (promisee)

Under the TPA, the third party's right of enforcement of the term does not prevent the promisee to enforce any term of the contract,⁹⁰ although the promisor is protected from double liability.⁹¹ In contrast, under the CoGSA 1992, once rights of suit are transferred to the lawful holder of a bill of lading, the original party's rights are extinguished.⁹² The DCFR does not provide any particular rule in this context, but it seems in line with the rules of contract law that the contracting party can require performance by his counterpart to the third party, unless the contract provides otherwise.⁹³

Defences

Provision is made in the TPA to allow the promisor to use certain matters as defence or set-off against the claim by the third party, to ensure that he is not worse off than if the promisee had enforced the contract or if the third party had been party to the contract.⁹⁴ If this was applied for example in a multimodal bill of lading context⁹⁵ the carrier could rely as against the third party on contractual variations⁹⁶ that were never included into the bill of lading, which would run counter to the current status quo in sea carriage where the terms of the bill of lading are conclusive as against the third party holder.⁹⁷ The DCFR has however a much more pliable solution. It sets out that the right to assert defences against the third party which the contracting party could assert against the other party to the

⁸⁷ DCFR Commentary to II.-9:303 at B. This would be counter to the solution that the third party has the rights to performance and remedies for non-performance under a unilateral juridical act, as set out in II.-9:302(a).

⁸⁸ DCFR, II.-9:303(3).

⁸⁹ See also Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Rose (ed), *LEX MERCATORIA: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP Professional Publishing, 2000), 345, 353-354.

⁹⁰ TPA 1999, s4. It is suggested that therefore the rule of *Dunlop v Lambert* as interpreted by Lord Diplock in *The Albazero* ([1977] AC 774 (HL)) is hardly necessary, since the promise can enforce also the terms of the contract in favour of the third party (Treitel, op cit, 348 and 372 – 375 and see Bugden, op cit, 14-026).

⁹¹ TPA 1999, s 5.

⁹² CoGSA 1992, s 2(5).

⁹³ See DCFR, II.-9:301(2) and see also DCFR Commentary to II.-9:302(b).

⁹⁴ TPA 1999, s 3.

⁹⁵ If one argued that this bill would not fall under the 1992 CoGSA; see above n.28 on this discussion.

⁹⁶ Agreed between the parties before the bill of lading was issued.

⁹⁷ See TPA 1999, s 3(2) (a): "The promisor shall have available to him by way of defence or set-off any matter that (a) arises from or in connection with the contract and is relevant to the term, and (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee." And see Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Rose (ed), *LEX MERCATORIA: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP Professional Publishing, 2000), 345, 352.

contract is subject to contrary provision in the contract.⁹⁸ The commentary clarifies that availability of the defences of the contracting party is a default rule only and that any provision to the contrary may be made, express or by implication.⁹⁹ This therefore allows the implication, if not already expressly included, implied by the contract or imposed by mandatory rules,¹⁰⁰ that at least a transport document which is treated as a document of title is conclusive in the hands of the third party. The contracting parties cannot hold any variations against the third party, and in particular no indemnities one of them may have provided in this context. This will be of crucial importance particularly where the contracting parties knowingly misstated the goods or the goods' condition in the transport document..

Transfer of obligations

The TPA does not envisage, create or allow enforcement of contractual rights by any contracting party **against** the third party, so that above and beyond any claims arising from defences or set-off available to the promisor, the third party is not liable, whether for freight, expenses or for damages caused by the cargo or else.¹⁰¹ This should mean that a carrier could use his lien to withhold delivery, but once delivered could not claim any outstanding freight from the third party. Such claims would however be possible if the CoGSA 1992 applied.¹⁰² However, the TPA does not oust rights or remedies of a third party apart from the Act and therefore does not abolish the common law solutions of implied or collateral contracts.¹⁰³ Such implied contract might also be argued by the carrier to sue the consignee for freight and other expenses.

If the DCFR was to apply, similarly to the TPA, the third party could not be burdened with obligations or duties as only rights or benefits could be conferred. However the rights or benefits could be subject to any conditions or limitations under the contract, so that freight and other charges may be payable against delivery of the goods to the third party. The benefit may thus reduce, yet no burden greater than the benefit could be imposed. The position of a pledgee or of an intermediate holder of a bill of lading would thus also be appropriately secured. The pledgee of the bill would be holder of the bill of lading, but once he indorsed and transferred the bill to another the rights (and any connected 'conditions') would pass with it, as for any other intermediate holder. Such result was also achieved under the CoGSA 1992 by case-law of (what was then) the House of Lords.¹⁰⁴

It is suggested that this is a sufficiently appropriate distribution of rights and obligations. The parties to the contract of carriage have their respective rights and obligations. To impose duties or liabilities on the third party over and beyond the benefit conferred, such as the value of the cargo, seems not necessary or appropriate. The shipper and carrier remain under contractual obligations of their own.¹⁰⁵ Even though the CoGSA 1992 allows the lawful holder of a bill of lading to be burdened with liabilities, whether below, up to, or beyond the value of the cargo, the courts have been reluctant to impose serious burdens, such as the liability for dangerous cargo, and tended to interpret the requirements of the CoGSA restrictively, so as not to impose the burden on the third party.¹⁰⁶

⁹⁸ DCFR, II.-9:302(b).

⁹⁹ DCFR Commentary to II.-9:302 on rule(b).

¹⁰⁰ See Hague Visby Rules, art III r4.

¹⁰¹ See TPA 1999, s 3 and Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Rose (ed), *LEX MERCATORIA: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP Professional Publishing, 2000), 345, 346, 360.

¹⁰² CoGSA 1992, s 3.

¹⁰³ See Treitel, *op cit*, 358 and above at 2.2.

¹⁰⁴ *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205.

¹⁰⁵ See also DCFR Commentary to II.-9:302 as to the independence of the rights of the contracting parties according to ordinary rules of contract law.

¹⁰⁶ See the speech of Lord Hobhouse in *Borealis AB v Stargas Ltd* [2001] UKHL 17; [2002] 2 AC 205 at para 33: "From the context in the Act and the purpose underlying section 3(1), it is clear that section 3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are." And see *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205 and *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm), [2006] 1 Lloyd's Rep. 457. And see also *Miramar Maritime Corp v Holborn Oil Trading (The Miramar)*, HL [1984] 2

4. Conclusion

The DCFR provides for sufficient flexibility to allow the parties of a contract of carriage to vest rights in a third party holder, consignee or consignor, as the case may be. It is capable of applying to the various transport modes and documents and could thus unify the fragmented UK position. This in turn could help to avoid putting too much emphasis on the selection of the instrument depending on the use of transport mode(s) and document. Where transport conventions apply, their rules also fit within the framework of the third party rights rules, so that an overall unified and harmonious approach is achieved. Overall no drastic change needs to be feared, although some adjustment and rethinking would be required from a UK perspective. The detailed application of the principles will need to be clarified and moulded by their application in the courts. In so doing, courts should however be careful to consider the autonomous character of the DCFR and the spirit of the DCFR rules as a whole - rather than leaning too closely to any case-law developed under the previous instruments - so as to enable progress towards true harmonisation.

Lloyd's Rep 129 at p 132, Lord Diplock, although not directly on the CoGSA 1992 but on the undesirable effects of charterparty incorporation clauses in bills of lading if accepted to readily, it being unlikely that the consignee would want to accept "blindfold a potential liability to pay an unknown and wholly unpredictable sum for demurrage... [and where] that sum may actually exceed the delivered value of the goods to which the bill of lading gives title".